OCT 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 75-259

R. L. GARDNER and RUTH GARDNER, *Petitioners*,

vs.

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; JACK D. HERRINGTON, Secretary and Executive Director; THE VANDERBILT UNIVERSITY; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Respondents*.

CHARLES H. ADAIR and JUNE P. ADAIR, *Petitioners*,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS THE VANDERBILT UNIVERSITY AND METROPOLITAN DEVELOPMENT AND HOUSING AGENCY AND JACK D. HERRINGTON IN OPPOSITION

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OPINIONS BELOW

The various opinions of the lower courts, all unreported, are set forth in the Appendix to the Petition.

JURISDICTION

The jurisdictional requirements for review by this Court are adequately presented by the Petition.

QUESTIONS PRESENTED

Respondents respectfully submit that there are only two questions presented in the Petition for Certiorari which should be considered by this Court. These two questions are numbered III and IV in the Petition for Certiorari and may be stated as follows:

I

Whether the hearings afforded Petitioners pursuant to the requirements of 42 U.S.C.A. Section 1455(d) and other applicable provisions of the federal urban renewal laws were in compliance with the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

II

Whether 42 U.S.C.A. Section 1463, as applied to Tennessee R-51, is unconstitutional and in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The remaining two questions presented by the Petition are inappropriately presented inasmuch as they do not involve issues which are properly the subject of review through Petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to 42 U.S.C.A. Section 1455(d) and 42 U.S.C.A. Section 1463(a) which are set forth in the Petition at pages 4-6, the Petition should have included Section 1 of the Fourteenth Amendment to the United States Constitution.

United States Constitution Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT

This litigation involves the validity of Tennessee R-51, a conventional urban renewal project undertaken and implemented as a joint project between the Nashville Housing Authority (now the Metropolitan Development and Housing Agency or "MDHA") and several private redevelopers pursuant to the authority granted under Tennessee state law and federal law embodied principally in 42 U.S.C.A. Section 1463 and related sections of the federal urban renewal laws.

In 1961, the City Council of the City of Nashville (later the Metropolitan Government of Nashville and Davidson County) made a preliminary determination that the proposed project area designated as Tennessee R-51 was a slum, blighted and deteriorating area. Based upon this

determination, the federal government allocated funds to make a planning study of the project area to determine its feasibility as an urban renewal project. From 1962 through 1965 studies of the area were made by the engineering firm of Clark & Rapuano, Inc. of New York City. In addition to studying street patterns, storm drains, water, sewer and other utilities in the area, the firm considered the quality of the structures within the area on a structure-by-structure inspection. The structural survey included an exterior survey which was confirmed by a 10% random sampling interior inspection.

As originally conceived, the project area encompassed a much greater geographical area than was ultimately approved by the Metropolitan Council in August of 1967 and submitted to the Department of Housing and Urban Development (HUD) for approval of federal funding. The original project involved several major private redevelopers including The Vanderbilt University, Peabody College, Scarritt College and St. Thomas Hospital. When finally approved by the Metropolitan Council, The Vanderbilt University ("Vanderbilt") and St. Thomas Hospital remained as private redevelopers in the area and land would be available for other public and private redevelopment. Contrary to statements by Petitioner the acquisition area was only the Vanderbilt University expansion area, the record shows the acquisition area included parcels for streets, schools, parks, utilities and other redevelopment. In 1970 St. Thomas requested and was given permission by the local and federal agencies to be allowed to withdraw from the project.

Following the planning stages, the final project plan was submitted to the Metropolitan Council by the MDHA for first reading on August 1, 1967. Immediately prior to this submission, the plan was reviewed by the engineering firm which determined that the area qualified under fed-

eral regulations for federal funding and was also a slum and blighted area within the meaning of Tennessee law. Upon approval of the Plan, the Metropolitan Council passed Ordinance No. 67-278 which adopted the findings of the Nashville Housing Authority and its consultants that the University Center Urban Renewal Area, Phase I, constituted a "slum, blighted and/or deteriorated area" within the technical definitions established under state and federal urban renewal laws and regulations. On March 20, 1968, Tennessee R-51 was finally approved for federal funding by HUD, and an allocation order was issued and funding began. On March 26, 1970 Petitioners filed suit in the United States District Court for the Middle District of Tennessee seeking to halt the project. Defendants in the initial lawsuit were the Nashville Housing Authority (later MDHA), Vanderbilt and various individuals who served on the Board of the Nashville Housing Authority and as employees of the agency. The federal agency was not made a defendant in the original action. Petitioners based their lawsuit upon the following basic contentions, all of which were denied by Respondents: (1) alleged conflicts of interest for members of the Board of the Nashville Housing Authority who approved Tennessee R-51; (2) alleged civil conspiracy between the Nashville Housing Authority, Vanderbilt, and the Metropolitan Government to obtain approval of Tennessee R-51; (3) alleged failure of officials of the Nashville Housing Authority to comply with statutory requirements in approving Tennessee R-51; (4) alleged failure of Respondents to afford Petitioners fair and meaningful hearings upon the proposed project area as required by law; (5) alleged unconstitutionality of 42 U.S.C.A. Section 1463.

After a full trial, the District Judge entered his Memorandum of Opinion on September 30, 1971 (Appendix to Petition at pp. 25-62) which disposed of all issues raised

in favor of Defendants and dismissed the case for lack of subject matter jurisdiction (Appendix to Petition at p. 62). The case was appealed to the Sixth Circuit Court of Appeals which remanded the case with leave to Petitioners to join HUD as an indispensable party. Petitioners refiled their Complaint joining HUD as a Defendant and raised the identical issues previously tried. It was agreed that the record in the subsequent action would become cumulative with proof taken at the previous trial, and all additional proof addressed the two new issues raised: (1) whether there were arbitrary and capricious actions by HUD officials in the implementation of HUD's responsibilities as to Tennessee R-51; (2) whether, since Petitioners did not bring this suit until the project was well on its way to completion, the action was barred by laches. Dealing with each of the issues previously considered by the District Court and the two additional issues raised, the Trial Judge entered his Findings of Fact and Conclusions of Law (Appendix to Petition at pp. 66-83) and found in favor of Respondents on all issues including the issues raised in the previous action; an Order was entered dismissing the case on March 5, 1974 (Appendix to Petition at p. 84). Petitioners appealed to the Sixth Circuit which reviewed the briefs and the records of the two District Court trials and held:

> "We can find no basis for holding any of his [Judge Thomas'] findings of fact to be clearly erroneous. In this regard we refer specifically, although not exclusively, to his findings 1 through 7. Nor do we perceive any error in the District Judge's legal conclusions." (Appendix to Petition at p. 86).

The Court of Appeals adopted the opinion of Judge Thomas and affirmed the judgment. Motion for rehearing in the Court of Appeals in behalf of Petitioners was denied (Appendix to Petition at p. 90).

ARGUMENT

Petitioners have completely aired their position four times to date. They have had two trials on the merits before District Judges, and twice they have raised all the issues before the Court of Appeals. In each instance they have been turned down on the merits. The form of the Petition indicates that they wish to retry this lawsuit before this Honorable Court. It is apparent from the Petition that Petitioners wish to have the entire record presented prior to a determination being made on the Petition. What the Petition fails to acknowledge is that reviewable issues must be presented, and it is apparent in this case that none are present. Likewise, none of the considerations of Rule 19 of the Rules of the Supreme Court is present in this case. There is no conflict between circuits upon any of the issues raised; no decision conflicting with state law is involved; there are no questions (much less, important questions) of federal law which require decision; the decisions in this case are entirely consistent with the precedents of this Court; all the decisions of the lower courts in this case are in accordance with the accepted and usual course of judicial proceedings.

From its outset, this case has involved purely factual issues. In every decision of the lower courts, such factual issues have been categorically resolved in favor of Respondents, and now Petitioners wish to have these matters considered again.

The Petition states with regard to the first question presented for review by it that "the Court of Appeals in the case at bar held *in effect* that overt acts of conflict of interest must be proved before actions of an administrative agency would be set aside by the courts." Petition,

p. 13 (emphasis supplied). In fact, the Court of Appeals found quite simply and explicitly that based upon the facts and circumstances presented no conflict of interest existed. There was nothing implicit in its finding that would give rise to an inference that a new or different standard for the proof of unlawful conflict of interest on the part of public officials was established by the decision. The issue involved a matter of Tennessee law under the Tennessee conflict of interest statute, Tennessee Code Annotated, Section 13-910 (1973), and the Court of Appeals decision, as well as both decisions of the trial judges, found: "Inspection of that statute discloses no prohibition which deals remotely with the facts of this case." (Appendix to Petition at p. 89). If the tenuous circumstances relied upon by Petitioners are sufficient to create an unlawful conflict of interest, it is safe to say that most local boards staffed by public spirited individuals would be unlawfully constituted.

The second question which the Petition purports to raise is likewise a factual question. Petitioners request this Honorable Court to overturn the legislative and administrative determination that Tennessee R-51 was a slum and blighted area qualifying for federal assistance as an urban renewal project. Petitioners would also have this Court inquire into the determinations of the MDHA and HUD officials which authorized the project and approved federal funding.

While it is well-established that legislative determinations are not reviewable in the absence of a clear or palpable or obvious abuse of discretion, both trial judges in this case examined the facts underlying the determination that the project qualified as an urban renewal area, and both found unequivocally that the area did in fact qualify

(See Opinion of Judge Thomas in Appendix to Petition at pp. 71-73). The effect of legislative determinations in the urban renewal context has been discussed widely, and in this case the district court decisions went beyond the maximums required under any standard of review to reach decisions which are clearly supported by the facts of this case. *See, e.g., Berman* v. *Parker,* 348 U.S. 26 (1954); *Harrison-Halsted Comm. Group* v. *HHFA,* 310 F.2d 99 (7th Cir. 1962); *Apostle* v. *City of Seattle,* 422 P.2d 289 (Wash. 1966); *Crawford* v. *Redevelopment Authority,* 211 A.2d 866 (Pa. 1965); *In re Bunker Hill Urban Renewal Project IB,* 389 P.2d 538 (Calif. 1964); *Berggren* v. *Moore,* 392 P.2d 522 (Calif. 1964).

The Petition states that the lower courts determined that the actions of the Metropolitan Council and the local and federal agencies are not subject to judicial review (Petition, p. 17). Such a statement completely disregards the detailed Findings of Fact of both trial judges in which the determinations of all parties as to the qualification of the project area were examined in detail and found to be wholly sufficient. After making a review of the entire record, the Sixth Circuit incorporated the findings of Judge Thomas in its final opinion (Appendix to Petition at p. 89).

Having disposed of the first two questions raised in the Petition, attention is directed to the final two questions as restated herein. It is acknowledged that these two questions are appropriate for consideration upon Petition for Certiorari; however, the Petition should be denied as to each of these questions for the reasons hereinafter stated.

I

Whether the hearings afforded Petitioners pursuant to the requirements of 42 U.S.C.A. Section 1455(d) and other applicable provisions of the federal urban renewal laws were in compliance with the due process requirements of the United States Constitution.

The Findings of Fact of Judge Thomas specifically reviewed the number of hearings which were granted Plaintiffs and found them to be "fair and meaningful" and in compliance with the law. The findings of Judge Thomas were:

> "11. The record is without dispute that the plaintiffs and other property owners attended a public hearing sponsored by the Nashville Housing Authority within the project area on November 4, 1965. Again on July 19, 1967, at the time the final plans for the project were formulated, another public hearing was held in the Project area which was attended by the plaintiffs and other property owners. Then on August 7, 1967, the Nashville Metropolitan Council held a public hearing in the Municipal Auditorium of Nashville which was attended by between 350 and 500 people. At all of the public hearings the project was explained by officials of the Nashville Housing Authority, and the advisability of the project was discussed and debated. At the public hearing before the Metropolitan Council, practically all of the challenges to the project raised in this suit were argued before the Council by the plaintiffs and by one of the District Councilmen, after which on August 15, 1967, the Council voted 30 to 4 in favor of Ordinance 67-278 approving the project.

12. Prior to these public hearings reasonable notice was given, the hearings were well attended and residents who had questions or protests were heard.

13. A project site office was opened within the project area in 1965. Maps and plans were kept in this office and were open for public inspection. The record discloses that the plaintiffs Adair and other property owners frequently visited this office and were given such information as was available. Detailed computations concerning the rating given the different structures in the area were available prior to the adoption of the Ordinance by the Metropolitan Council and in fact the validity of such ratings was questioned and debated before the Council on much the same charges of irregularity as are made here. In addition, the plaintiffs Adair and other property owners were granted requests to appear before the Board of Commissioners of NHA to register their protests prior to NHA's recommendations being forwarded to the Nashville Metropolitan Council. Then after the adoption of the project by the Nashville Metropolitan Council the plaintiffs Adair were given a hearing by HUD officials prior to HUD's agreeing to fund the project. The evidence indicated that these were 'fair and meaningful hearings'.

14. The Court finds that the plaintiffs were not denied access to the project area plans, surveys, records and ratings on the structures involved. The public hearings held, and particularly the hearing on August 7, 1967, before the Metropolitan Council complied with Title 42 USC, Section 1455(d) and T.C.A. 13-815."

Petitioners request this Honorable Court to reexamine the record to determine if the facts warrant the findings

of all the lower courts that the requirements of due process were amply satisfied. The record shows that prior to the adoption of the plan, the Adair Petitioners were represented by counsel James F. Neal, a former U. S. Attorney, and were successful in getting one of their properties deleted from the acquisition program. The record shows that not only was due process amply satisfied, these Petitioners received every accommodation at both the local and federal level.

Petitioners are apparently requesting this Court to step into the shoes of the executive and promulgate regulations for compliance with the requirements of 42 U.S.C.A. Section 1455(d). It is well settled that this Court does not give advisory rulings. The only issue is whether the rights of Petitioners were violated, and the records show such was not the case. Petitioners assert on page 18 of the Petition that their challenges to the hearing procedure were "dismissed by the Court of Appeals with the statement that it found 'no procedural due process,'" an apparent misquote. To the contrary, the Sixth Circuit found *upon examination of the entire record,* that Petitioners were accorded the full benefits of due process of law:

> "Further, like the District Judge, we have found in this record no abuse of procedural due process and no arbitrary and capricious actions on the part of either the federal or the local agencies. It seems to us, as it obviously did to Judge Thomas, that Nashville in general and these plaintiffs in particular have known the purpose of this plan for at least ten years." (Appendix to Petition at p. 87).

The decisions of the trial judges and the Sixth Circuit are correct, and the facts involved in this issue should not be retried.

II

Whether 42 U.S.C.A. Section 1463, as applied to Tennessee R-51, is unconstitutional and in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The urban renewal statute under which Tennessee R-51 has received federal funding, 42 U.S.C.A. Section 1463, provides that private educational institutions, such as colleges and universities and hospitals, may participate in duly approved urban renewal projects. Generally, such participation includes allowing the municipality to receive "credit" toward federal appropriations for expenditures made by the private institution. The private institution may be allowed to develop all or part of a project area. The statute requires that the Project be approved under state and local law after public hearing, and it must then be approved by HUD.

The constitutionality of 42 U.S.C.A. Section 1463 has been passed upon only one time directly in reported decisions. In *Ellis* v. *City of Grand Rapids,* 257 F. Supp. 564 (W.D. Mich. 1966), even though a private hospital was involved in the project, much as Vanderbilt University is participating in the project before this Court, the court stated:

> "We hold that participation by a private sectarian hospital as a redeveloper in an urban renewal project is not unconstitutional." 257 F. Supp. at 570.

The *Ellis* case raised and resolved many of the same issues which are before this Court. As to the community benefit to be derived from the Project, the court found:

> "The position of St. Mary's Hospital would have as a redeveloper is exactly the same as that of any other

> redeveloper. On the other hand, because of the credits which St. Mary's Hospital has accumulated under Section 112 of the Housing Act, 42 U.S.C.A. Section 1463, the cost of the project as far as the city is concerned, will be considerably less. Whatever St. Mary's Hospital has paid for land and buildings will be credited to the City's share of the project cost, which in turn, determines the federal allotment. Thus, the more St. Mary's Hospital has paid, the less the City will pay, and the less the City of Grand Rapids pays, the more the United States Government pays." 257 F. Supp. at 570.

And further, the court went on to say:

> "[I]t is obvious that the private uses which will finally be involved after a redevelopment project has been implemented are of an incidental or ancillary character, and that of paramount importance is the established public purpose of beautification and redevelopment. Once this primary purpose has been established, it is generally irrelevant what incidental or secondary purposes are involved. The possibility that plaintiff's or any person's property in the area may subsequently be sold to St. Mary's Hospital is inconsequential." 257 F. Supp. at 571.

Any determination of the constitutionality of a provision such as 42 U.S.C.A. Section 1463 must begin and end with the landmark decision of this Court in *Berman* v. *Parker*, 348 U.S. 26, 75 S.Ct. 78, 99 L.Ed. 27 (1954), which was relied upon by the court in *Ellis*. In *Berman* v. *Parker*, the constitutionality of the Redevelopment Act passed by Congress for Washington, D.C., was challenged. The statute gave preference to private enterprise over public agencies in executing the redevelopment plan. The statute

was held to be constitutional even though the project involved redevelopment by private enterprise. The Court noted that great weight must be given to legislative determinations in this area:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citations omitted] or the states legislating concerning local affairs. [citation omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." [citations omitted] 348 U.S. at 32.

Petitioners would have this Court believe that Tennessee R-51 is distinguishable from the situation in *Berman* v. *Parker, supra*, because, Petitioners allege Tennessee R-51 was motivated solely by private Vanderbilt University interests. All the evidence as well as the findings of both Trial Judges and the Sixth Circuit is contrary to Petitioners' position.

The Project was in no way conceived or developed solely for the use of Vanderbilt University. The Project was from its inception a community project designed to benefit the entire Nashville community. As Judge Morton determined in the first hearing of this matter:

> "At its inception, the University Center Urban Renewal Project included the Hillsboro Village shopping area, the Music Row area and the University and hospital complexes. When the plan was approved by the

> Nashville City Council in August, 1961, it was foreseen as *a project which would be of benefit to the entire Nashville community.* Vanderbilt was to benefit, as were the other universities in the area and the music industry and economic interests which were located in the area. The Project was to provide a vehicle for orderly expansion, reduced traffic problems, and provide minimal cost for improving utilities and sewers in the area." (Appendix to Petition at p. 46) (Emphasis supplied).

In view of the foregoing determination, it cannot seriously be contended that Tennessee R-51 was developed solely for the private benefit of Vanderbilt University. The Court in *Berman* v. *Parker* found:

> "In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." 348 U.S. at 33.

The Court in *Berman* v. *Parker* recognized the pervasive influence which was necessary for an effective urban renewal project:

> "In the present case, Congress and its authorized agencies attacked the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the Project were determined with regard to the needs of the particular community. The experts concluded that if the com-

munity were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were unsanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

* * *

If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." 348 U.S. at 34-35.

On the basis of *Berman* v. *Parker* and *Ellis* v. *City of Grand Rapids*, and the factual determinations outlined above, it is respectfully submitted that the constitutionality of 42 U.S.C.A. Section 1463 and its application in Tennessee R-51 is indisputable. There is no justifiable basis upon which the decision of *Berman* v. *Parker* should be reconsidered.

CONCLUSION

Based upon the foregoing Statement and Argument, it is respectfully submitted that the Petition filed herein should be denied.

Respectfully submitted,

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